No. 50067-1-II
(Pierce County No. 14-2-12880-6)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DAVID TURK and MARISSA TURK,
Plaintiffs-Respondents,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, USAA CASUALTY INSURANCE COMPANY, USAA GENERAL INDEMNITY COMPANY, and GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY,
Defendants-Petitioners.

BRIEF OF RESPONDENT

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I. INTRODUCTION

After extensive discovery and a lengthy hearing, the Superior Court made three rulings, each of which USAA asserts as an assignment of error: it (1) granted Partial Summary Judgement interpreting a release entitled "**Bodily Injury or Death with Subrogation Provisions**" consistently with admissions by Petitioner ("USAA")'s own employees that the release did not cover, (and was not intended by USAA to cover), loss of use claims under the *separate* UIM Property Damage ("UIM PD") coverage; (2) declined to strike the declaration of Respondents' ("Plaintiffs'") statistical Expert Dr. Bernard R. Siskin; and (3) Certified a proposed Class of USAA insureds who – like the Turks - had not received compensation from USAA for loss of use, (called "LOU" by USAA), owed under the UIM PD coverage.

As shown below, given the unambiguous language of the release, including its bolded title, and the extensive evidence before the trial court, including the admission by USAA employees that the release only covered bodily injury claims, not loss of use, *and the lack of any contrary evidence from USAA*, the Superior Court did not err in construing the release.

USAA's second argument asserts that the Superior Court "relied upon [Dr. Siskin] to find ascertainably, commonality, predominance, and superior" despite the fact that he had not "develop[ed] any statistical

model" and "'sampling' would violate U.S. Supreme Court precedent and due process." Pet. Br. at 7. All three arguments are incorrect. Even a quick read of the Superior Court's thirteen-page Class Certification Order shows that it did not cite Dr. Siskin's declaration; instead, it primarily relied upon a spreadsheet of electronic data of 500 claims *that USAA pulled for its hired experts, and USAA itself provided in conjunction with its Opposition to Class Certification*. As the Superior Court found, this spreadsheet showed how the statutory requirements could be met with common evidence (i.e., such as that contained in the spreadsheet of 500 claims). *See* Class Cert Order at 2, 4-7, 10-11, n.1-2 (CP 1415 - 1419) (citing and discussing "the data provided by USAA in its Turk 500 Claim File Review Master Spreadsheet").[1] As shown below, what USAA *actually gathered from its record*s confirmed what Dr. Siskin, based upon data that USAA's corporate designee had testified USAA itself kept/maintained, said it would show. The Superior Court, in certifying the proposed class, so to speak "cut out the middle man," relying in its written order on the *actual data* USAA itself produced, not Dr. Siskin's testimony regarding what data USAA could provide and how it could be used.

[1] A part of this data is filed at CP 1302, and the *Respondent's Appendix to Response to Motion for Discretionary Review* (B180 – 184) showing the data for a number, but not all, of the 499 claims that USAA pulled its data on.

In any event, USAA's further argument that at Class Certification an expert must have *completed* a damage model is meritless, and directly contrary to the prior decisions of this Court, as demonstrated below. USAA's further arguments that sampling cannot be used was appropriately rejected by the Superior Court which found:

> Plaintiff has further presented the Court – again using the claims data that USAA itself gathered – with what appears to workable methods of determine the amount of loss on a class-wide basis for loss of use on both totaled and repairable vehicles. Using data on similarly situated individuals to value the loss for others, as Plaintiffs propose, has been accepted in Washington and Federal Law as a method to determine damages. *Moore v. Health Care Auth.*, 181 Wn.2d 299, 332 P.3d 461 (2014); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016).

Class Cert Order at 11 (CP 1424). The Superior Court did not abuse its discretion.

USAA's core argument to this Court – that the Class of USAA insureds should not have been certified - is based upon a purported ruling *that the Superior Court did not make*: USAA argues that the Superior Court erred in holding "that the measure of loss of use…is the cost of a rental car, rather than plaintiff's 'inconvenience.'" Pet Br. at 6. Yet, this is NOT what the Superior Court held in any way, shape, or form. It is a material misstatement to this Court. As the Superior Court actually found, (entirely consistently with both *Holmes v. Raffo*, 61 Wn.2d 421, 374 P.2d

356 (1962) and this Court's decision in *Straka Trucking, Inc. v. Estate of Peterson*, 98 Wn. App. 209, 211, 989 P.2d 1181 (2000)):

> The parties also strongly dispute the legal standard that applies to the loss. USAA contends – both in their motion to exclude the testimony of Dr. Siskin and in Opposition to Class Certification - that only the value of "actual inconvenience" is recoverable, and argue that the value of a rental car is not a permissible way of valuing the loss under the policy. Yet, the evidence before this Court is that USAA itself offered the Turk's a rental vehicle for their loss of use (but only after their vehicle was already returned to them) and that USAA's policy is to provide a rental vehicle under UIM PD. Moreover, under Washington Law, "loss of use, may be measured by (1) lost profit, (2) cost of renting a substitute chattel, (3) rental value of the Plaintiff's own chattel, or (4) interest." *Straka Trucking, Inc. v. Estate of Peterson*, 98 Wn.App. 209, 211, 989 P.2d 1181(2000). Notably, damages for loss of use of an automobile will be allowed despite the failure of the owner to procure another vehicle. *Holmes v. Raffo*, 61 Wn.2d 421, 431, 374 P.2d 356 (1962). Evidence of the value of a rental car therefore appears to be one method of showing the value of loss of use, particularly where here, in an insurance context, it is the method used by the insurer defendant, and Plaintiffs are simply seeking what they content they would have been entitled to under the policy, had the loss been properly assessed and paid at the time it occurred

Cert Order at 5-6 (CP 1418 - 1419) (underlining added). The Superior Court's ruling is consistent with *Holmes* which holds "Proof of what it reasonably would have cost to hire a substitute automobile is sufficient evidence to carry this item of damages to the jury, but is not the measure of such damages. It is relevant evidence in determining the general damages for inconvenience resulting from loss of use of an automobile,"

id. at 61 Wn.2d at 432 (underling added)[2], and *Straka's* holding that "loss of use may be measured by … (2) cost of renting a substitute chattel." 98 Wn. App. at 211.

The Superior Court's observation that *evidence* of the cost of a rental car can be submitted to support loss of use is also consistent with that of other Washington Courts. For example, in *DePhelps v. Safeco Ins. Co. of America*, 116 Wn. App. 441, 65 P. 3d 1234 (2003) Division Three stated that "A claim of loss of use of a car was insufficient to sustain an award of damages absent any proof of the value of such use per day or week, or the cost to rent another car for the same uses during the same time." *Id*. at 1239 (citing *Norris v. Hadfield*, 124 Wash. 198, 203, 213 Pac. 934 (1923)).

Nor, having NOT made the straw man ruling USAA invents, did the Superior Court state that USAA would be prevented from arguing that certain members of the Class did not have damages through *evidence* that for a few members of the Class no actual inconvenience had occurred.

[2] In a rather disturbing misstatement USAA's counsel quotes *Holmes* as follows: "[W]here . . . a plaintiff has not rented a substitute automobile, . . . [p]roof of what it reasonably would have cost to hire a substitute automobile . . . is not the measure of such damages." Pet Mot. at 2. USAA's ellipses have entirely changed the Court's holding. USAA's argument is not only not based upon a material misstatement of what the Superior Court actually held, but also upon a material misstatement of what *Holmes* held.

Instead, the Superior Court showed a keen understanding of the issue and how it could be addressed in a class wide manner noting that:

> to the extent that USAA has shown that a few members of the Class may have had a disability making use of a rental less likely, as Plaintiffs showed using the data in USAA's spreadsheet, these Class members can be identified and the common defense raised against them addressed with common evidence.

Cert Order at 6, n.2 (CP 1419); further stating, (based upon a careful review of a spreadsheet of 500 potential class members USAA provided), that:

> it appears that this information can be used to determine not only damages, but also to identify those members of the Class to which USAA's asserted affirmative defenses apply, and the likely impact of these defenses on class-wide damages. As such, it appears that as in *Moeller*, this matter can be tried with common evidence, while allowing USAA to fully present any valid defenses in a single proceeding.

Cert Order at 11 (CP 1424). Nothing in the ruling under review either misstated or misapplied the legal standard for loss of use in this State,[3] nor prevents USAA from presenting *evidence* that there were no damages for loss of use for any member of the proposed Class, or from providing evidence that the way USAA itself has paid loss of use (i.e., by paying for

[3] As WPI 30.16, which is expressly based upon *Holmes*, states, one element of economic damages is: "Reasonable compensation for any loss of use of any damaged property during the time reasonably required for its [repair] [replacement]."

a rental car) is not evidence that the trier of fact should find persuasive in determining "reasonable compensation for any loss of use."

II. ASSIGNMENTS OF ERROR

Respondents do not raise any cross-issues.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

Because as noted above, USAA has raised purported issues *that are based upon a material misstatement of the Superior Court's actual rulings*, and as such are simply straw man arguments, and fails to identify the proper standard of review of each issue, Plaintiffs have restated them to reflect the actual rulings upon which review is sought.

1. Whether the trial court erred in holding, *consistent* with *Holmes*, 60 Wn.2d at 432 ("Proof of what it reasonably would have cost to hire a substitute automobile is sufficient evidence to carry this item of damages to the jury") and *Straka*, 98 Wn.App. at 211 ("loss of use may be measured by …(2) cost of renting a substitute chattel") that "Evidence of the value of a rental car therefore appears to be one method of showing the value of loss of use, particularly where here, in an insurance context, it is the method used by the insurer defendant." Class Cert Order at 6 (CP 1419).

2. Whether the trial court abused its discretion in finding (Class Cert Order at 4 - 7, 10-11, n.1-2 (CP 1417 – 1420; 1423 – 1424; 1418 -

1419) that common *evidence* as to the amount of contractually owned, but unpaid, loss of use could be presented through what USAA had itself paid for rental cars, and those class members to which USAA's defense that for them no "actual inconvenience" had occurred could be identified from USAA's records, and as such Class Certification was warranted.

3. Whether the Superior Court abused its discretion in finding that the ascertainability, commonality, predominance, and superiority requirements were satisfied, where the evidence presented from USAA's files, and USAA's own review of 500 potential class member's claims, showed that issues of class membership, whether class members sustained a cognizable loss of use, and the amount of lost use could be determined with common proof. (Class Cert Order at 4 - 7, 10-11, n.1-2) (CP 1417 – 1420; 1423 – 1424; 1418 – 1419).

4. Whether the Superior Court abused its discretion in denying Defendants' motion to strike the expert report of Plaintiffs' statistician Dr. Siskin, and while primarily relying upon the "the data provided by USAA in its Turk 500 Claim File Review Master Spreadsheet" (Class Cert Order at 4, (CP 1417)) to find ascertainability, commonality, predominance, and superiority, finding that *when the merits were reached* "Using data on similarly situated individuals to value the loss for others, as Plaintiffs

propose, has been accepted in Washington and Federal Law as a method to determine damages." Class Cert Order at 11 (CP 1424).

5. Whether the trial court abused its discretion in finding that the superiority requirement was satisfied based upon Plaintiffs' showing of how class-wide liability and damages could be determined using "the data provided by USAA in its Turk 500 Claim File Review Master Spreadsheet." (Class Cert Order at 2, 4 - 7, 10-11, n1-2) (CP 1417 – 1420; 1423 – 1424; 1418 – 1419).

6. Whether the trial court abused its discretion in finding that Plaintiffs were adequate class representatives with typical claims, when, among other things they, (i) fall within the class definition and seek the same relief as the Class; (ii) "Mr. Turk is a named insured and participated in chauffeuring his daughter, Marissa Turk, as a result of her vehicle being damaged in an accident and her not receiving a rental under the UIM PD coverage from USAA" Class Cert Order at 10 (CP 1423); (iii) "Mr. and Ms. Turk contend, and have testified, that they repeatedly requested a rental car from USAA under their UIM PD coverage, and that they were denied a rental car as they did not have Rental Reimbursement Coverage" (Class Cert Order at 5 (CP 1418)) and while USAA *later* offered a rental *to the Turk's BI attorney*, ("The Court notes that it is unaware of any evidence in the record suggesting the Turks acknowledged any such offer,

and observes that had they *in fact* received a rental car (or the value of one from USAA), there would be no lawsuit.") *Id.*; and (iv) Ms. Turk's claims were not barred by the Release Agreement.

7. Whether the trial court erred in entering partial summary judgment for Plaintiffs on the Release, where the Superior Court invited USAA to present any evidence relevant to construing the release, there were no disputed issues of fact regarding the scope of the release, and the release language was clear.

IV. STATEMENT OF THE CASE

A. The Turks' individual claim

November 17, 2013 an uninsured driver rear-ended Marissa Turk. Plaintiff's Motion for Class Certification at 4 (CP 723). She and her father, David Turk, immediately reported the claim to USAA, telling USAA she was hit by an uninsured driver. *Id*. at 4, 5 (CP 723, 724). The Turks asked for a rental vehicle. USAA *repeatedly* refused to provide a rental, telling the Turks that they had not bought "rental reimbursement coverage" and as such could not have a rental vehicle during repairs. (CP 724). As Mr. Turk testified "we beat it to death." (CP 724; 86). Directly contrary to USAA's assertions that it discloses and provides coverage for loss of use, USAA's claims representative admitted he "advise[d] no rental reimbursement" would be provided to the Turks. (CP 725; 78).

Mr. Turk described in his deposition how he asked multiple times for a rental vehicle:

> We talked again about -- multiple times. If I don't understand it, I don't let it go. And so it's like – the rental car was a big thing on that call because of – I didn't understand why [his daughter Ms. Turk] didn't get her rental car. If you're hit by somebody and they have insurance, you're covered, you're going to get a rental car, you're going to get everything owed to you for the damages of your vehicle, or the extent of it. And she wasn't at fault. She was hit by this other driver. No license, no insurance, no nothing. It wasn't his car. The car is not insured. From the information that was provided by the officer that he got from the – the drivers --

(CP 724; 077). Mr. Turk further told USAA that Ms. Turk did not have funds to pay for a rental, but USAA did not budge and told them "that one would not be provided in any way… they're not going to provide a rental car at USAA's expense." (CP 725; 078).

Although it is not relevant to whether those who, like the Turks, did not receive loss of use can seek payment at this time,[4] USAA spent considerable time below, and now in this Court (Pet. Br. at 8-10, 18-22) trying to justify its failure to offer a rental under the UIM PD coverage until *the Turk's involved a Bodily Injury lawyer in their Bodily Injury*

[4] Plaintiffs filed suit only for breach of contract, and do not seek to recover under the consumer fraud act. The appropriateness (or inappropriateness) of USAA's claims handling is therefore tangential to this case.

claim, and well after the *forty* days it took to repair Mr. Turk's vehicle.[5] USAA's current pitch for why it was a "day late and a buck short" in providing loss of use is that it could not provide a rental until it had "fully investigated" to determine the at fault party had no insurance. Notably, USAA cites no evidence that the Turks were ever told this, nor is this recorded in USAA's records. Nor does this explanation make any sense. First, the justification is contrary to USAA's claims manual which states that the claims representative is to "advise the member we will extend UMPD coverage based upon the details reported." 12/16/15 Deposition of Michael Price as CR30(b)6) designee of USAA; (hereafter "Price Depo.") at 37:3-38:22. (Hansen Decl Exh E) (CP 124). While Plaintiffs pointed this out to the Superior Court, USAA's brief ignores USAA's own written policy on extending coverage. Here, Mr. Turk repeatedly reported to USAA, and provided documents to USAA showing, that the at fault party was not insured. Turk Depo. at 57:17-24; 60:16-24; 74:19-75:3, 75:20-77:8, 78:20-79:22, 101:5-12; 114:5-15 (CP 73; 77; 78; 84; 87). Second, the *written* policy (not the spin USAA's lawyers put on its conduct) makes

[5] While USAA implies the period of repair is somehow unknowable, Ms. Turk's 2013 Scion was taken to a USAA "designated repair facility" where her vehicle was repaired. As the estimate paid by USAA shows, her date of loss was 11/17/13 and the "vehicle out" field shows that her vehicle was returned to her after repairs on 12/27/13. USAA-Turk 044 (Hansen Decl, Exh D) (CP 105 - 113). Simple math shows she was without the use of her vehicle for 40 days.

complete sense, as any expenses USAA incurs will either be owed under the UIM PD coverage, or if USAA later locates insurance, will be subrogated.

B. USAA's Practices Regarding Loss-of-Use Claims

USAA tells this Court in the first sentence in its statement of facts that its "policy and consistent practice is to pay LOU" (Pet. Br. at 8) (underling added). While as the Superior Court correctly found, "it is admitted by USAA that it has an obligation to pay for loss of use under this common policy language. (See e.g., Plaintiffs' Exh B at USAA-Turk-2386 ('Based on the 'Insuring Agreement,' it is the company's opinion that our policy provides broader coverage to include payment of the following elements of damage: * Loss of Use…'))," Class Cert Order at 4 (CP 1417), USAA provided no evidence, nor does it cite any proof, that it *consistently* pays loss of use and that what actually happened to the Turks is contrary to USAA's claims.

Self-evidently, if USAA was *consistently* paying loss of use on UIM PD claim, rather than spending multiple hundreds of thousands of dollars defending this lawsuit, it would have paid Ms. Turk for her loss – *it still has not* - and provided proof that it had paid the loss to its insureds. As the Superior Court trenchantly noted in its Order Certifying the Class if

the Turks "*in fact* received a rental car (or the value of one from USAA), there would be no lawsuit." Cert Order at 5 (CP 1418).

Further, while USAA admits that loss of use is owed on UIM PD claims, and its corporate designee *asserted* that when USAA identifies "that there is an uninsured motorist exposure, we do discuss all pertinent benefits, including the presence of loss of use" (Price Depo at 20:19-21 (CP 63 - 64)), none of the documents nor training materials USAA produced mentioned this *alleged* policy to disclose and explain all benefits, including loss of use. Nor could USAA identify any documents that explained how this alleged disclosure was made to its insureds. *Id*. at 21:23-22:20, 24:22-25:24 (CP 120 -121). So, while USAA's corporate designee attempted to paint an oral picture of appropriate and timely disclosure, no documents backed up these claims. This likely accounts for the very large number of UIM PD claimants who – like the Turks – did not have rental reimbursement coverage, and as a result did not receive a rental car from USAA.

Finally, when USAA provided a rental under the Rental Reimbursement Coverage (as it did on many UIM PD claims, which are as such not within the Class),[6] USAA did so under policy language stating:

[6] The very rare exception would be an insured who was denied a rental for part of their repair period, because they hit policy limits for the rental coverage. However, USAA's sample of 500 did not identify any such person, although they can be identified given that

"We will reimburse you only for that period of time reasonably required to repair or replace your covered auto." 5/17/16 Hansen Decl ISO Class Cert, Exh A at 13 (CP 35). Plaintiffs have not challenged the reasonableness of these payments, nor does USAA, which owed a duty of good faith and fair dealing when it determined what "period of time [was] reasonably required" for a rental on them.

While these claims are not in the Class, they *do* represent a type of "control group," for whom the rental reimbursement "reasonably required" was determined by USAA. On average, this figure is almost certain to be functionally identical to those in the Class who did not get loss of use compensation because they lacked rental reimbursement coverage. As Plaintiff's expert Dr. Siskin has explained, there is no logical reason the average time to repair would be different for those with rental reimbursement than those without. 7/7/16 Siskin Depo at 56:20-57:5 (CP 932; 933). USAA's determination as to what period of rental was "reasonably required" for a large sample of repairs is also legally relevant as it mirrors what Washington law allows: "[t]he reasonableness of the time for which loss of use is to be compensated is as it would appear

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USAA knows the policy limits for each member of the Class and as such can pull any that hit policy limits for the rental coverage for further review.

to an ordinary prudent man under all the circumstances." *McCurdy v. Union Pac. R.R.*, 68 Wn.2d 457,479 413 P.2d 617 (1966).

The proof, however, is ultimately in the pudding, and while it need not be resolved by this Court, as the Superior Court appropriately noted "[t]he Court does not resolve this dispute, which ultimately goes to the size of the Class" Class Cert at 5, n.1 (CP 1418),[7] as the Superior Court found having carefully reviewed the evidence:

> The data provided by USAA in its Turk 500 Claim File Review Master Spreadsheet, suggests that there is no evidence, for a large part of the Proposed Class, that the insureds received either disclosure of coverage for loss of use, (and, as such, did not know they could make a claim), or that the loss was every paid.

Class Cert at 4 (CP 1417).

C. What USAA's Data Showed

The Superior Court's observation, *having carefully reviewed USAA's spreadsheet*, was-well supported by the evidence. Plaintiffs' expert Dr. Siskin was provided USAA's spreadsheet of computer data on

[7] USAA attacks this finding claiming that USAA must "routinely" not pay LOU or there can be no recovery as there is no "systematic or classwide violation." Pet. Br. at 43. USAA does not cite any law requiring a majority of any larger group be class members, and USAA's claim that Plaintiffs said so, is simply untrue. Those who received a rental vehicle are not in the Class, and whether 80% as USAA claims, or a smaller number of USAA insured having UIM PD claims, received a rental car, simply impacts the size of the Class as the Superior Court found. Everyone within the certified class was impacted by USAA's practices, as none of them received loss of use, which USAA admits is owed under the insurance policy, but has not developed any written policies or training to disclose or pay.

500 claims it prepared for its own experts, and as shown in his reply declaration, USAA's data showed that 42.08% of all UIM PD claims received a rental, and as such were not in the Class. 11/14/16 Reply Decl. of Bernard R. Siskin at ¶7 (CP 1250).[8] As Dr. Siskin further noted, USAA's data showed "that an additional 27.05% (135 of 499) declined a rental vehicle… If these people are found to not be entitled to loss of use, then it would simply reduce the class size, and any accompanying overall damages." *Id*. at n.4.

For those who *did not receive a rental*[9], the data available from USAA, as shown in the sample of 500, allowed class-wide and individual damages to be calculated. As Dr. Siskin found:

> While there are a few cells where data is not complete, for nearly all there is information on (a) USAA's assessment

[8] Although USAA records the coverage under which a loss was paid in its computerized data, 5/17/16 Class Certification Motion at fn 13 and 15, (CP 728, 734), and it appeared from context that the vast bulk of these payments were under the Rental Reimbursement (REN) coverage, the spreadsheet USAA provided to its experts from its computerized data did not show the coverage under which a rental vehicle was provided. USAA tries to argue to this Court that the fact that it paid for a rental on a number of claims shows that "insureds were offered LOU at least 80% of the time" Pet. Br. at 43. USAA badly misstates what the evidence shows. USAA does disclose and provide a rental car when an insured has paid for the separate "rental reimbursement" coverage. USAA could have provided, where it helpful to its argument, what coverage each rental car was provided under on the spreadsheet of 500 claims it provided to its experts, and this would have shown how often – *if at all* – coverage for loss of use (as opposed to rental car coverage) was disclosed and paid.

[9] The parties disputed how many this was, with the answer being determined based upon the common question of whether those who declined a rental car were entitled to loss of use damages. Based upon this merits decision, which the Superior Court did not resolve, as the Superior Court noted "It appears from the data provided by USAA that the proposed class could be as low as 6,000 members and could be as high as 11,000. At either number the membership is sufficiently large for numerosity." Class Cert at 7 (CP 1420).

> on the estimate of drivability, (b) the DOL, (c) the date the initial estimate was provided, (d) the date a rental car was offered, (e) the repair amounts, (f) the estimates of the amount of labor needed, which as Mr. Harber explains is correlated with the time to repair, and (g) the dates that a rental car was provided and returned, along with the amount paid, from which an average can be determined….
>
> Class wide damages for those who did not get a rental vehicle, can therefore be estimated using the information that is available as to those who did receive loss of use via rental car coverage. …
>
> the loss of use for any individual can [then] be determined from USAA's records, the records of body shops, or for each individual based upon proxy variables (such as repair cost and labor hours) that are correlated with repair period, for both non-drivable repairs (where the loss of use is from DOL to the date the vehicle is returned) and drivable repairs (where the loss of use is during the repair period).

11/14/16 Reply Decl. of Bernard R. Siskin at 4-6 (CP 1250 – 1252).

While USAA repeatedly argued below, and now to this Court that its data is not perfect, as Dr. Siskin explained, this is typically the case, and is no impediment to accurately determining damages:

> USAA's focus appears to be on the issue of incomplete data. Yet, in my experience data errors are random, and it appears to me from USAA's sample data set that the incomplete nature of the data is likewise random. As such, missing data should not bias the estimates. Furthermore, analysis of class wide damages is often conducted with missing data and the use of proxy variables, if necessary. In my experience, companies almost never have a complete data set without missing data.

Id. at 2 (CP 1248). As Dr. Siskin further explained, having reviewed USAA's sample data set, all necessary data to determine class membership and individual damages were available *on total loss claims*:

> As to the first claim (i.e., total losses), the data provided in USAA's spreadsheet shows that the information necessary for determining damages is readily available, both as regards class wide damages and individual losses for total loss claims. For example, vehicle #3 on USAA's spreadsheet had a date of loss (DOL) of 11/11/11, was not drivable per the estimate, and was determined to be a total loss on 11/15/11, and no loss of use was provided or offered. Applying the then-current average rental car rate during the period from the DOL to the date of loss settlement, plus adding the value of the time to purchase a replacement vehicle after the date of payment provides the individual loss of use amount, and will provide the Class wide damages for total losses over a sample. USAA's sample spreadsheet shows that this data is readily available, which is what USAA's 30(b)(6)'s made clear (as discussed in paragraph 6 in my earlier declaration.

Id. at 3 (CP 1249) (footnotes omitted). Further "As to *repairable* claims, USAA's spreadsheet further shows that while some data may be incomplete for some individual claims, which may require the use of a proxy variable in a distribution phase, the available data will make it possible to model Class wide damages based upon USAA's own data." *Id*. at 4 (CP 1250).[10]

[10] As was extensively discussed in Plaintiffs briefing and the hearing below, and by Dr. Siskin in his *two* declarations (CP 173 -182; CP 1247 – 1252) but is entirely glossed over by USAA before this Court, damages can be determined slightly differently *for total losses* (where the period of loss of use is determined by USAA as being from the date of loss until payment on the total loss, plus three days, and USAA has every bit of necessary

D. *The Turks did not release their property damage claims.*

Ms. Turk was injured in the rear-end collision with the uninsured driver. Ms. Turk hired a bodily injury lawyer, Ms. Jeanette Coleman, who expressly told USAA she was not addressing the property damage claim. The topic of LOU or property damages claims was never discussed or negotiated. (CP 1189 – 1198).

USAA ultimately offered to settle the bodily injury claims for $25,000. USAA sent a cover letter with a standard pre-printed release. At the top of the page, the pre-printed release stated:

> **"UNINSURED MOTORIST COVERAGE RELEASE**
> **(Bodily Injury or Death With Subrogation Provisions)."**

(CP 1147 – 1148) (bolding in original). As USAA's claim's representative on the Turk's claim, David Swain, testified this was a "a bodily injury release" and had nothing to do with property damages. (CP 1141 – 1142).

USAA's own actions further confirmed that the release pertained only to the bodily injury coverages, not the separate UIM PD coverages. As USAA's internal claims note stated: "A payment of $28,143.99 was issued…The nature of payment is: Payment under Underinsured Motorists

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data), and repairable vehicles (where the loss of use is determined by USAA to be from the date the vehicle is not drivable to the date it is returned after repair, and where proxy variable may be needed for a distribution phase).

Bodily Injury, Personal Injury Protection coverage." (CP 1202). The check that USAA sent also stated "NATURE OF PAYMENT: Payment under Uninsured Motorists Bodily Injury, Personal Injury Protection Coverage." (CP 1200).[11]

The Superior Court noted that on three prior occasions it had told USAA that "if there is anything that the defense could present, then the court would have something to look at as to the very specific, very clear release that Ms. Turk signed." (VRP __). Since USAA presented *nothing* the Superior Court ruled that:

> there are no genuine issue of material fact as to what the release is. It is not ambiguous. … I do look at the contract as a whole, not just the language in the provision, but the language in the title, and it was for bodily injury not property damage or loss of use. So I'm granting summary judgement."

VRP ___.

E. The Superior Court Carefully Considered the Evidence On The Statutory CR23 Factors and USAA's Arguments Regarding Holmes.

[11] As Plaintiffs argued to the Superior Court VRP ___ the Washington Administrative Code sets strict standards insurers must fallow in regards to settling claims, including setting forth the coverage under which a payment is made (WAC 284-30-330(9)) and as to releases prohibiting them extending beyond the subject matter and coverage under which they were paid. (WAC 284-30-350(5)). USAA's own actions in characterizing the payment put an end to any argument that the release could possibly relate to any claims under the separate UM PD coverage, for which a separate premium was paid.

In its written ruling, the Superior Court made three sets of findings which are directly pertinent to the issues USAA now asserts. First, on what standard applies to LOU, the Superior Court found:

> The parties also strongly dispute the legal standard that applies to the loss. USAA contends – both in their motion to exclude the testimony of Dr. Siskin and in the Opposition to Class Certification - that only the value of "actual inconvenience" is recoverable, and argues that the value of a rental car is not a permissible way of valuing the loss under the policy. Yet, the evidence before this Court is that USAA itself offered the Turk's a rental vehicle for their loss of use (but only after their vehicle was already returned to them) and that USAA's policy is to provide a rental vehicle under UIM PD. Moreover, under Washington Law, "loss of use, may be measured by (1) lost profit, (2) cost of renting a substitute chattel, (3) rental value of the Plaintiff's own chattel, or (4) interest." *Straka Trucking, Inc. v. Estate of Peterson*, 98 Wn.App. 209, 211, 989 P.2d 1181 (2000). Notably, damages for loss of use of an automobile will be allowed despite the failure of the owner to procure another vehicle. *Holmes v. Raffo*, 61 Wn.2d 421, 431, 374 P.2d 356 (1962). **Evidence of the value of a rental car therefore appears to be one method of showing the value of loss of use, particularly where here, in an insurance context, it is the method used by the insurer defendant, and Plaintiffs are simply seeking what they content they would have been entitled to under the policy had the loss been properly assessed and paid at the time it occurred**.

Class Cert Order (CP 1418 – 1419 (bolding added)).[12] The Superior Court's well-reasoned decision undercuts USAA's argument that the

[12] The Court further addressed the unpublished federal case upon which USAA based its legal argument noting that:

Superior Court disregarded *Holmes*. The Superior Court correctly viewed the evidence Plaintiffs proposed to use – proof of the cost of a rental car – as "one method of showing the value of loss of use" it did not hold that the cost of a rental car was the "measure" of loss of use. There is a big difference in what USAA has argued, and the Superior Court found. The Superior Court's Opinion is consistent with *Holmes* which holds (when not ellipsed as USAA has done to change its meaning): "Proof of what it reasonably would have cost to hire a substitute automobile is sufficient evidence to carry this item of damages to the jury, but is not the measure of such damages. It is relevant evidence in determining the general damages for inconvenience resulting from loss of use of an automobile," (*id*. at 61 Wn.2d at 432).

Second, the Superior Court further considered USAA's arguments that individual inquiries made the case unmanageable, that Dr. Siskin had

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> USAA bases its argument on an unpublished federal case, *Price v. City of Seattle*, 03-cv-1365-RSL (W.D. Wa 9/19/06) which involved an effort to recover damages under a tort theory for a Class of drivers whose vehicles were impounded for driving with a suspended license. The unique facts of that case – where it appeared all of the Class were not legally entitled to drive a rental car – are not present in this case. Moreover, to the extent that USAA has shown that a few members of the Class may have had a disability making use of a rental less likely, as Plaintiffs showed using the data in USAA's spreadsheet, these Class members can be identified and the common defense raised against them addressed with common evidence.

Class Cert Order at p. 6 n.2 (CP 1419).

not shown a reasonable way to determine damages, and that a "trial plan" had not been presented. As the Superior Court repeatedly noted, the evidence on these points came from USAA's *own* review of a sample of 500 UIM PD claims, which showed how the matter was manageable. As the Superior Court stated in its Order:

> at the hearing, Plaintiffs provided a complete copy of Exhibit 4 (the Turk 500 Claim File Review Master Spreadsheet). Plaintiffs' counsel explained at the hearing that they had inadvertently filed only the first page in support of Plaintiffs' motion. The data contained in this Spreadsheet was extensively discussed at the hearing as it related to the issues of ascertainability, the ability to address damages, and any affirmative defenses using common evidence.

Class Cert Order at 2 – 3 (CP 1415 – 1416). Addressing how this spreadsheet – *prepared by USAA from its claims data* – showed the matter was manageable, and the class was identifiable. As the Superior Court found:

> It appears from the Court's reading of the materials that USAA admits that it has an obligation to pay for loss of use under this common policy language. (See e.g., Plaintiffs' Exh B at USAA-Turk-2386 ('Based on the 'Insuring Agreement,' it is the company's opinion that our policy provides broader coverage to include payment of the following elements of damage: * Loss of Use…")).
>
> Plaintiffs admit that at times USAA will provide a rental vehicle for "loss of use." They note that when this is done, this is recorded in USAA's electronic claims data and the claims files are coded as such. However, they contend that USAA routinely failed to compensate its insureds for loss

> of use and loss of use damages, even though USAA admits that it is part of the coverage. USAA, in turn, asserts that it routinely discloses and pays the loss. The data provided by USAA in its Turk 500 Claim File Review Master Spreadsheet, suggests that there is no evidence, for a large part of the Proposed Class, that the insureds received either disclosure of coverage for loss of use, (and, as such, did not know they could make a claim), or that the loss was every paid.

Class Cert Order at 4, 5 (CP 1417 - 1418). As the Superior Court noted, the parties' real dispute – *which it appropriately did not resolve* – was not whether data existed to address issues Class-wide (it did, as USAA showed with its sample of 500 claims), but rather how large of a group of USAA insureds could obtain compensation for LOU when the merits were reached:

> Plaintiffs contend that, in this sample of 499 UIM PD claims, 42.06% of them received a rental car, 135 of 499 (27.05%) of the claims a rental was offered - whether under the separate Rental Reimbursement coverage or Loss of Use is not shown - but for reasons that USAA categorizes was declined. But for the remainder of the claims, USAA did not provide any loss of use compensation. USAA disagrees with these percentages and claims that the chart reflects affirmative evidence of a rental offer 80% of the time. Contending, that the chart shows affirmative evidence of a rental payment in at least 216/499 claims (more than 43%), and affirmative evidence of an offer in an additional 178 /283 claims, for a total of 394 claims, or 79%. The Court does not resolve this dispute, which ultimately goes to the size of the Class.

Class Cert Order at 5 (CP 1418 n.1). The Superior Court found certification appropriate because USAA's data allowed the Class to be identified:

> The exhibits presented by Plaintiffs show the extent of the data that USAA maintains in its records. This includes, but is not limited to, specific detailed information on when the UIM claims might have been opened versus the date of loss, whether the vehicle was drivable, and identifies those who were offered a rental vehicle and/or received a rental vehicle. As such, the class is identifiable for notice and the definition is unambiguous.

Class Cert Order (CP 1420). As the Superior Court found, purported individual factually issues did not predominate, as they could be addressed with common evidence:

> Here, USAA's arguments about why someone may have declined a rental car, or if someone "pocketed" the money rather than having their vehicle repaired, do not predominant over the overarching principal question of whether loss of use was disclosed and paid, and if not, the amount of damages that are owed under the policy. As Plaintiffs have shown using the sample data that USAA provided, the "individual issues predominate" arguments presented by USAA simply constitute common questions which may apply to subsets of the members of the Class. **Moreover, these common questions can be addressed with common evidence, by, for example, determining the percentage of those who pocketed the money (rather than the body shop being paid for repairs), evidence of which is provided in the sample of claims USAA has itself compiled**.
>
> **Plaintiffs have further presented the Court – again using the claims data that USAA itself gathered – with what appears to workable methods of determining the**

> **amount of loss on a class-wide basis for loss of use on both totaled and repairable vehicles.** Using data on similarly situated individuals to value the loss for others, as Plaintiffs propose, has been accepted in Washington and Federal Law as a method to determine damages. *Moore v. Health Care Auth.*, 181 Wn.2d 299, 332 P.3d 461 (2014); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016). As such, the ability to determine damages using common evidence predominates as well, further supporting Class Certification.

Class Cert Order at 10 – 11 (bolding added) (CP 1423 - 1424). The Court finally found that the data – again provided by USAA itself – showed that the case was manageable:

> The Court has carefully considered and given weight to the difficulties that it may present to USAA to access data on the potential class members. However, as shown at the Class Certification hearing, a significant amount of information has already been provided with USAA's sample information. As Plaintiffs demonstrated, it appears that this information can be used to determine not only damages, but also to identify those members of the Class to which USAA's asserted affirmative defenses apply, and the likely impact of these defenses on class-wide damages. As such, it appears that as in Moeller, this matter can be tried with common evidence, while allowing USAA to fully present any valid defenses in a single proceeding.

Class Cert Order (CP 1424).

As to USAA's claims about the Turks (Mot. at 17-19), having correctly found that no release had waived UIM PD claims, the Superior Court found them adequate:

> There has been considerable argument that Mr. David Turk is not a representative class member, yet he appears to fit

> within the proposed class. Mr. Turk is a named insured and participated in chauffeuring his daughter, Marissa Turk, as a result of her vehicle being damaged in an accident and her not receiving a rental from USAA under her UIM PD coverage. Whether that is sufficient to qualify Mr. Turk as a class member is not for the Court to decide at present. As such, the Court will appoint Mr. Turk as a representative at this time, absent any further motion. Certainly, Ms. Marissa Turk can fairly and adequately represent the class. She has been actively involved since this case was filed in 2014, and she is appointed to represent the Class. Nor does the Court see any conflict of interest between the class representatives and the potential class members at this time.

Class Cert Order at 10 (CP 1423).

III. ARGUMENT

A. Standard of Review

While USAA correctly states the standard applicable to the issues it raises, it fails to address the rules which apply in the context of Class Certification which explain what discretion is afforded the Superior Court.

First, regarding expert testimony which is presented at Class Certification, as is well explained in the *Manuel for Complex Litigation* (4th Ed. 2004):

> Expert witnesses play a limited role in class certification hearings; some courts admit testimony on whether Rule 23 standards, such as predominance and superiority, have been met. The judge need not decide at the certification stage whether such expert testimony satisfies standards for admissibility Courts have applied a high threshold for assessing the need for expert testimony at the certification stage. A judge should not be drawn prematurely into a battle of competing experts

Manual §21.221 at 267-8. Nor, as Washington Courts have found, (contrary to USAA's argument), must the expert's work be completed and admissible; rather, a methodology to gather necessary evidence should be shown. For example, then Judge Van Deren, later Chief Judge of this Court found, declining to exclude Dr. Siskin in a prior case finding that:

> The methodology proposed by Dr. Siskin has been challenged, as has the lack of existence of exact data, and the method [he] proposes to use to gather data on sales…These arguments, and others put forth by Defendants go to the merits of the Plaintiffs' claims for recovery of inherent diminished value…. [A class action] should not, and will not, impede [defendant's] ability to … defend against the nature and extent of damages, if any, in this Court.

11/14/16 Hansen Decl., Ex 5 at 13 (CP 1316). This Court upheld, finding that "a preliminary plan of how to proceed to gather the data on vehicles and how to manage this litigation as a class action" fully supported class certification. *Moeller v. Farmers Ins. Co. of Wa.,* 155 Wn. App. 133, 150, 229 n. 14 (2010). "[A]n evaluation of the probable outcome on the merits is not properly part of the certification decision." *Amgen Inc. v. Conn. Ret. Plans*, 568 U.S. 455, 133 S.Ct. 1184, 1195 (2013).

Second, while USAA spends considerable time arguing the merits of the Superior Court's exercise of its discretion, the issue is whether Plaintiff's showing is "sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence

ultimately will be persuasive." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2nd Cir 2001). Further, in reaching its decision, as the Washington Supreme Court has made clear:

> CR 23 is liberally interpreted because the "`rule avoids multiplicity of litigation, "saves members of the class the cost and trouble of filing individual suits[,] and . . . also frees the defendant from the harassment of identical future litigation."'" *Weston v. Emerald City Pizza, LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007) (alterations in original) (quoting *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318, 54 P.3d 665 (2002) (quoting *Brown v. Brown*, 6 Wn. App. 249, 256-57, 492 P.2d 581 (1971))). A class is always subject to later modification or decertification by the trial court, and hence the trial court should err in favor of certifying the class. *Id.*

Moeller v. Farmers Ins. Co. of Wa., 173 Wn.2d 264, 278, 267 P.3d 998 (2011). Courts "resolve close cases in favor of allowing or maintaining the class." *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 250, 63 P.3d 198 (2003); *Smith v. Behr Process*, 306, 319, 54 P.3d 665 (2002).

The Superior Court may, as part of the requirement to perform a "rigorous analysis," go beyond the pleadings and examine the parties' evidence to the extent necessary to determine whether the requirements of CR 23 are met. *Oda v. State*, 111 Wn. App. 79, 89, 93, 44 P.3d 8 (2002). However, in doing so, "the court is not at liberty to consider whether the moving party has stated a cause of action or is likely to prevail on the

merits." *Grays Harbor Adventist Christian Sch. v. Carrier Corp*., 242 F.R.D. 568, 571 (W.D. Wash. 2007) (citing *Hanon v. Dataproducts Corp*., 976 F.2d 497, 508 (9th Cir.1992))

Here, the Superior Court has stayed well within its discretion.

B. The Superior Court Correctly Applied Washington Loss of Use Law to The Facts of This Case.

As shown above at 3-6 and 21-23, the Superior Court carefully considered *Straka* and *Holmes* finding that under the facts of this case, they supported Certification.

As shown above, and directly contrary to USAA's arguments that the "standard adopted by the trial court" was "the cost of a substitute rental" (Pet. Br. at 38) the Superior Court instead stated that:

> Evidence of the value of a rental car therefore appears to be one method of showing the value of loss of use, particularly where here, in an insurance context, it is the method used by the insurer defendant, and Plaintiffs are simply seeking what they content they would have been entitled to under the policy, had the loss been properly assessed and paid at the time it occurred

Cert Order at 5-6 (CP 1418 - 1419) (underlining added). Not only did the Superior Court not "adopt a standard," but the Superior Court expressly explained that USAA could argue and present *evidence* that certain members of the Class had suffered no damages as they were unable to use their vehicle or a substitute vehicle. Showing a keen understanding of the

issue and how it could be addressed in a class wide manner the Superior Court observed that:

> to the extent that USAA has shown that a few members of the Class may have had a disability making use of a rental less likely, as Plaintiffs showed using the data in USAA's spreadsheet, these Class members can be identified and the common defense raised against them addressed with common evidence.

Cert Order at 6, n.2 (CP 1419).

USAA further asserts that *Holmes* prohibits the use of evidence of the cost of a substitute rental when "plaintiff did not rent a substitute vehicle." (Pet. Br. at 38). This argument is directly contrary to *Holmes* itself: in *Holmes,* plaintiff had not paid for a rental, *but provided testimony of what it would have cost had they rented a replacement vehicle*. 60 Wn.2d at 429. As was more typical of cases prior to Pattern Jury Instructions, *Holmes* lists the "only evidence offered by plaintiffs on this matter of damages" (*id*. at 428):

> Q Mrs. Holmes, were you folks without the use of your automobile for any period of time while it was being repaired? A Yes. Q Can you tell us for how long? A A little over a month. Q You have asked in that connection for an item of damages because of the loss of use of the automobile? A Yes. Q Would you tell us what that is? A The amount? Q Yes, please. A $300. Q And would you tell us upon what you base that figure, please? A Well, if we would have rented a car, it would have been — is that what you want? Q Yes, please. A $200.00 plus 10 cents mileage. We drove our car approximately 2,000 miles a month. The rental company paid the gasoline. Q And that is your

> computation of what it would cost you to replace your automobile during that period, is that correct? A Yes. Q Now, Mrs. Holmes, did you folks in fact rent an automobile? A We did not.

60 Wn.2d at 429. The trial court declined to submit the issue to the jury on the same grounds USAA argues is the law – that no loss of use was *recoverable* where a substitute vehicle was not rented. *Id*. at 428

Reversing, in a holding *directly contrary* to USAA's assertion that not having rented a substitute vehicle changes the analysis, (see Pet. Br. at 38), the *Holmes* Court first held that "the right to compensation for loss of use is not dependent upon the owner having hired a substitute automobile during the period when his automobile was being repaired." 60 Wn.2d at 431. The Court then addressed the proposed instruction that:

> **You will award [plaintiff] such sum as will reasonably compensate [plaintiff] for being deprived of the use of their automobile during the time necessarily consumed in repairing the damage proximately resulting from the accident.** That sum is the reasonable rental or use value of the automobile for the period of time just mentioned."

Id. at 422 (bolding added). The *Holmes* Court found that the first sentence was correct, but that the second was not "for the reason that a substitute vehicle was not rented." *Id*. This statement is clearly correct, as the evidence in the record before the court was just that *evidence*, and the

second sentence would have excluded other types of evidence, and, in essence, would have directed a verdict.

The instruction approved in *Holmes* is now WPI 30.16, see fn.3 above. *Holmes* did not approve an instruction on "inconvenience," nor has any case ever stated that what is recoverable for loss of use is the amount of "inconvenience." Nor does *Holmes,* as USAA argues, prevent evidence as to the cost of a rental car; it holds directly to the contrary: "[p]roof of what it reasonably would have cost to hire a substitute automobile is sufficient evidence to carry this item of damage to the jury, but is not the measure of such damages." *Holmes,* 60 Wn.2d. at 432. The case was remanded for trial based upon *exactly* the same evidence USAA claims is not admissible. *Id*. at 433.

Plaintiffs further note that it is highly questionable whether *Holmes* use of word "inconvenience" – which in any event is not reflected in the jury instruction - in conjunction with recovery for loss of use is still good law. In 1962, Washington characterized a private party's loss of use claim (as distinct from a claim for rental reimbursement, which was a form of special damages) as general damages for "inconvenience." *Holmes*, 60 Wn.2d at 429-30. In 1986, 24 years later, the legislature, in the 1986 Tort Reform Act replaced the terms "special" and "general" damages with "economic" and "non-economic" damages. RCW 4.56.250(1)(a) *and*

included loss of use in its definition of economic damages. However, the legislature retained "inconvenience" in its definition of non-economic damages at RCW 4.56.250(1)(b).

As such, while in 1962 "loss of use" was an item of general damages, distinct from "rental reimbursement" which was a type of economic loss, the legislature in 1986 made "loss of use" a type of economic damages *and separated it from the concept of "inconvenience."*

In 1999, 13 years later, this Court considered a case in which a Plaintiff did not rent a substitute vehicle but still claimed loss of use and held, "[l]oss of use claims are appropriate in the case of private chattels, such as the family car … Loss of use may be measured by (1) lost profit, (2) cost of renting a substitute chattel, (3) rental value of the Plaintiff's own chattel, or (4) interest." *Straka Trucking, Inc. v. Estate of Peterson*, 98 Wn. App. 209, 211, 989 P.2d 1181 (1999). Each of the *Straka* measures of damage are objectively verifiable measures of monetary losses, (i.e., they do not depend on any subjective consideration of a Plaintiff).

USAA argues that each individual must prove their own subjective "inconvenience" as *general damages*. (See e.g. Pet. Br. at 40 ("Ms. Turk is a 25-year old single woman who lives at home with her parents…who works with her mother; who was driven to work and back by her

parents…[and] could not run errands, get her hair done, or go to social events.")). Yet, such an approach is directly contrary to RCW 4.56.250(1)(a) ("'Economic damages' means objectively verifiable monetary losses, including …loss of use of property"). Further, directly contrary to how USAA argues "loss of use" must be shown, (i.e., with some unspecified and nebulous evidence that is not stated by USAA), post 1986 cases have treated "inconvenience" differently than "loss of use." (See e.g. *Panag v. Farmers Ins. Co. of Wa.,* 166 Wn.2d 27, 57–58, 204 P.3d 885 (2009), ("Inconvenience" not recoverable under CPA, while "loss of use" is); *Stephens v. Omni Ins. Inc*., 138 Wn. App. 151, 159 P.3d 10, 26 (2007) (same)). While "loss of use" has appeared in multiple post-1986 opinions, no opinion post-1986 opinion has ever applied "inconvenience" as a standard, let alone as *the* standard, to measure it. In this case, Plaintiffs seek compensation for what USAA's policy provides for "loss of use" not for "inconvenience," which is (post-1986) a different and distinct item of damages in Washington.

In any event, *Holmes* was decided before the pattern jury instructions, and the Court's meaning is clear. As *Holmes* makes clear, many – not just one – types of evidence can be used to show the amount of loss of use, and the approved jury instruction (which would be used in many other cases in a pre-pattern instruction era) needed to reflect this.

In turn, *Holmes* makes clear that the type of evidence Plaintiffs proposed using below, and USAA itself uses, the cost of a rental car, "is sufficient evidence to carry this item of damages to the jury." *Id*. at 432.

Holmes, correctly viewed, is consistent with this Court's opinion in *Straka Trucking, Inc. v. Estate of Peterson*, 98 Wn. App. 209, 211, 989 P.2d 1181 (1999). As in *Holmes*, the plaintiff in *Straka* was denied loss of use. The *Straka* Court reversed, applying "general tort principles" which it stated were as follows: "the plaintiff can almost always recover some measure of damages for a reasonable period of lost use…Loss of use may be measured by… (2) **cost of renting a substitute chattel, . . .**" *Id*. (bolding added).

What Plaintiffs have proposed using, and the Superior Court correctly found was a type of evidence that made the matter manageable, is one *type* of evidence (i.e., the cost of renting a substitute vehicle) which has found to be admissible in every Washington Case to have considered the issue.

USAA's entire argument to the Superior Court was built on a misreading of *Price v. City of Seattle*, 03-cv-1365-RSL (W.D. Wa 9/19/06), arguments that USAA touches upon in this Court. (Pet. Br. at 40-41). *Price* found that because "many class members were not legally entitled to operate their vehicles during the impoundment period because

their driver's licenses were suspended" that "loss of use damages cannot be fairly determined on a classwide basis." *Id*. at 8-9. However, as the Superior Court found, distinguishing *Price*:

> [Price] involved an effort to recover damages under a tort theory for a Class of drivers whose vehicles were impounded for driving with a suspended license. The unique facts of that case – where it appeared all of the Class were not legally entitled to drive a rental car – are not present in this case. Moreover, to the extent that USAA has shown that a few members of the Class may have had a disability making use of a rental less likely, as Plaintiffs showed using the data in USAA's spreadsheet, these Class members can be identified and the common defense raised against them addressed with common evidence.

Cert Order at 6, n.2 (CP 1419). The Superior Court correctly applied Washington Law.

C. The Superior Court Correctly Applied Its Discretion to Find That USAA's Documents and Sample of 500 Claims Showed That CR23 Ascertainability, Predominance, And Manageability Were Satisfied.

As noted above, Class certification is a special statutory procedure based in equity in which the Court determines if the statutory requirements of CR 23(a) and (b) are met. *Washington Ed. Assoc. v. Shelton School Dist. No. 309*, 93 Wn.2d 783, 789, 613 P.2d 769 (1980) ("WEA"). The merits of the case are not resolved. *WEA*, 93 Wn.2d at 790; *Sorrel v. Eagle Healthcare, Inc*., 110 Wn. App. 290, 300, 38 P.3d 1024 (2002). The trial court takes the substantive allegations of the complaint as true.

Smith v. Behr Process Corp., 113 Wn. App. at 318, 320 n. 4. A class is always subject to later modification or decertification by the trial court, and hence the trial court should err in favor of certifying the class. *Weston v. Emerald City Pizza, LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007).

Therefore, "A trial court's decision to certify a class is discretionary.... The court's decision will not be overturned absent a manifest abuse of discretion...." *Lacy Nursing Center, Inc. v. Dep't of Rev*., 128 Wn.3d 40, 47, 905 P.2d 338 (1995). "A discretionary decision rests on 'untenable grounds' or… 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if the court adopts a view 'that no reasonable person would take.'" *State v. Howland*, 180 Wn. App. 196, 204, 321 P.3d 303, 307 (2014).

As Plaintiffs demonstrated below, the evidence from USAA's witness, documents, and ultimately the spreadsheet of 500 claims that USAA prepared, showed that – *as the Superior Court expressly found* that it was possible to (a) identify members of the Class for notice, (b) determine Class wide damages, and then distribute that award post trial, and (c) address the affirmative defenses USAA had raised using common proof. (CP 1420 – 1421; 1424 - 1426). While USAA may disagree with

the Superior Court not simply adopting the assertions of its experts *in the face of contrary evidence*, this does not show an abuse of discretion.

USAA argues, (Pet Br. at 44-45) that Class Certification was not possible under *Wal-Mart Stores, Inc. v. Dukes*, 564 US. 338 (2011). Yet, as the Superior Court correctly found, rejecting this argument:

> Using data on similarly situated individuals to value the loss for others, as Plaintiffs propose, has been accepted in Washington and Federal Law as a method to determine damages. *Moore v. Health Care Auth.*, 181 Wn.2d 299, 332 P.3d 461 (2014); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016). As such, the ability to determine damages using common evidence predominates as well, further supporting Class Certification.

Class Cert. Order (CP 1424). As the Superior Court correctly found, *Tyson Food* directly rejected USAA's arguments regarding *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338 (2011) stating that "*Wal-Mart* does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability." 136 S.Ct. at 1048.[13]

As below, USAA entirely ignores the *unanimous* opinion in *Moore v. Health Care Auth.*, 181 Wn.2d 299, 332 P.3d 461 (2014), where plaintiff proposed that the damages be "based upon the average health care

[13] USAA's further assertion, Pet. Br. at 36, that it's due process right to present "every defense" makes a Class Action impossible is undercut by *Tyson Foods*, and *Moore*, 332 P.3d at 465-66, and is contrary to *Moeller v. Farmers Ins. Co.*, 173 Wn.2d 264, 279-280 (2011) which approved a similar use of common evidence.

costs for a comparable group of State employees with health benefits." 181 Wn.2d at 303. Observing that "it is not unusual, and probably more likely in many types of cases, that aggregate evidence of the defendant's liability is more accurate and precise than would be so with individual proofs of loss" (*id*. at 308), the Washington Supreme Court found that "[t]he facts of this case make it particularly suitable for using aggregate proof of damages [because] the number of total class members is large enough to be able to statistically estimate their health care costs by comparing the group with State employees who did receive health benefits (controlling for any demographic differences)." *Id*. The proof Plaintiffs propose, and the Superior Court found based upon the evidence, scaling from USAA's own payments to similarly situated UIM PD claimants with rentals, was approved by *Moore*.

Here, USAA's sample of 500 shows that the rental payments for those with rental coverage (drivability, type and nature of the damage, hours of repair time, and cost of repair) can be compared to the Class to determine an accurate class wide estimate of loss and fill any the "evidentiary gap." CP 1418.[14]

[14] In any event, the amount of damages is invariably an individual question and does not defeat class treatment. *Leyva v. Medline Indus. Inc*., 716 F.3d 510, 513 (9th Cir. 2013).

USAA's final arguments - ignoring a well-supported analysis from Plaintiffs of how the matter would be tried using common evidence – are that a "trial plan" and completed analysis from Dr. Siskin were both required. Pet. Br. at 37 and 46. As discussed above, these arguments are directly contrary to *Moeller v. Farmers Ins. Co.*, where Dr. Siskin presented *possible* methods to determine class wide damages.[15] This Court found that "a preliminary plan of how to proceed to gather the data on vehicles and how to manage this litigation as a class action" fully supported class certification. 155 Wn. App. 133, 150, 229 n. 14 (2010).[16]

D. The Superior Court Committed No Error in Finding The Turks To Be Adequate.

USAA argues that the Turks are not members of the proposed Class, (Pet Br. at 47-49), but ever explains how exactly the Turks – who had a UIM PD claim, and did not receive "payment for substitute

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[15] USAA cites, Pet. Br. at 44, *Oda v. State*, 111 Wn. App. 79, 94 (2002) for this proposition. However, the issue in *Oda*, was whether statistics could be used to show "proof of discriminatory intent," which is very different from what USAA is arguing. Not surprisingly, the *Oda* Court's holding is utterly irrelevant to this case:

> To summarize, the plaintiffs have not shown that a discriminatory motive can be inferred from the University's disinclination to use the salary study as the determinant for individual decisions about compensation. There is not a common course of conduct that will support certification of a class action.

[16] *Moeller* was in fact certified before Dr. Siskin had collected a single piece of data or analyzed a single Farmers File (that was done in 2003, and the certification occurred in 2002.

transportation" from USAA – allegedly do not fall within the Class. While USAA does not discuss the standard for adequacy, the Superior Court correctly states it in its Order, Cert Order at 9 (CP 1422), and finds that "Mr. Turk is a named insured and participated in chauffeuring his daughter, Marissa Turk, as a result of her vehicle being damaged in an accident and her not receiving a rental from USAA under her UIM PD coverage" *Id*. at 10 (CP 1423), which makes Mr. Turk, along with his daughter, part of the Class. USAA's further argument, Pet. Br. at 48, that Ms. Turk is not a Class member as USAA "never denied her LOU benefits" is not only directly contrary to the record and the findings of the Superior Court, but nowhere does the Class Definition require an express "denial;" rather, USAA insureds with UIM PD losses and "were without the use of their vehicle, for a day or more" and did not "receive payment for substitute transportation from USAA" are within the Class. Cert Order at 1, 5 (CP 1414, 1418).

E. The Superior Court Correctly Construed the Release.

USAA argues, Pet. Br. at 49-50, that the standard form release USAA drafted, despite its title, and the testimony of USAA's own witnesses, and USAA's own documents, all of which USAA fails to address in its brief, somehow applied to property damage claims. GEICO never explains what relevant evidence the Superior Court did not

consider, nor why this evidence would create disputed issues of fact in interpreting a written release under Washington Law, nor provides any citations to the record showing error, nor any legal authority to support its assertions. USAA's further assertion that the Superior Court struck any release defenses (Pet Br. at 50) is not only unsupported by any citation to the record, but is contrary to what USAA itself admitted elsewhere in its brief. Pet. Br. at 6 (noting that Partial Summary Judgement addressed "release Marissa Turk Signed). See CP 1404.

IV. CONCLUSION

This Court should DENY USAA's Appeal.

RESPECTFULLY SUBMITTED October 5, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 5th day of October, 2017, I filed the above and foregoing document with the Clerk of the Court of Appeals, Division II, State of Washington, and served a copy on counsel for Defendants/Petitioners via e-mail, as follows:

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